BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RALPH M. HANKINS	)	
Claimant	)	
	)	
VS.	)	
	)	
BUILDERS STEEL CO.	)	
Respondent	)	Docket Nos. 261,065 & 261,066
	)	
AND	)	
	)	
ST. PAUL FIRE & MARINE INS. CO.	)	
BUILDERS' ASSOC. SELF-INS. FUND	)	
Insurance Carriers	)	

ORDER

Claimant and respondent and its insurance carrier, St. Paul Fire & Marine Insurance Co., requested review of the June 1, 2004 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on November 9, 2004.

APPEARANCES

Dennis L. Horner, of Kansas City, Kansas, appeared for the claimant. John D. Jurcyk, of Roeland Park, Kansas, appeared for respondent and St. Paul Fire & Marine Insurance Co. C. Anderson Russell, of Kansas City, Missouri, appeared for respondent and Builders' Association Self-Insurers Fund.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

In Docket No. 261,065, the claimant alleged injuries to his right thumb and hand as a result of a work-related injury on March 23, 2000. In Docket No. 261,066, the claimant alleged repetitive injuries to both shoulders and both upper extremities each and every day worked from January 1990 through March 23, 2000.

The parties filed a stipulation which indicated that St. Paul Fire & Marine Insurance Co. (St. Paul) provided workers compensation coverage for respondent's employees while working on the Sprint campus project and Builders' Association Self-Insurers Fund (Builders) provided workers compensation coverage for respondent's employees on other projects.

The Administrative Law Judge (ALJ) found that claimant suffered three discrete traumatic accidents involving his right thumb, right hand, and right shoulder. In Docket No. 261,066, the ALJ determined the date of accidental injury to the right shoulder was February 5, 2000, (the date of the MRI confirming the right torn rotator cuff) and awarded claimant a 58 percent permanent partial scheduled disability to the right shoulder. In Docket No. 261,065, the ALJ determined claimant suffered injury to his right index finger on January 19, 2000, and injury to his right thumb on March 23, 2000. The ALJ awarded claimant a 20 percent permanent partial scheduled disability to the right index finger and a 10 percent permanent partial scheduled disability to the right thumb.

As previously noted, the parties had stipulated that St. Paul was the workers compensation carrier for the Sprint project and Builders was the workers compensation carrier for respondent's other projects. It is undisputed the thumb injury occurred while claimant was working away from the Sprint project and the right index finger injury occurred while claimant was working on the Sprint project. And the date of accident the ALJ determined for the right shoulder injury would place that injury within St. Paul's insurance coverage for the Sprint project. Interestingly, the ALJ awarded compensation for the right thumb injury against respondent and Builders but awarded compensation for the right index finger and right shoulder against respondent and both insurance carriers.

The claimant requested review and argues that in Docket No. 261,066, the ALJ erred in failing to find the date of accident was claimant's last day of work on March 23, 2000. Claimant further argues that as a result of his repetitive traumas to his bilateral upper extremities he is permanently and totally disabled. Consequently, the claimant requests the Board to modify the ALJ's Award to find the accident date was claimant's last day worked and that as a result of his work-related injuries he is permanently and totally disabled. Claimant does not dispute the ALJ's findings in Docket No. 261,065.

Respondent and its insurance carrier, St. Paul, argue that in Docket No. 261,066, the ALJ erred in failing to determine the date of accident was claimant's last day of work on March 23, 2000. In the alternative, if it is determined claimant only suffered a traumatic injury to the right shoulder it is further argued claimant failed to establish a date of accident as well as meet his burden of proof regarding timely notice and written claim. Respondent and St. Paul do not dispute the right index finger accident occurred during St. Paul's coverage but argue claimant failed to file an application for hearing for that injury.

Respondent and its insurance carrier, Builders, argue in Docket No. 261,066, the claimant suffered only a discrete traumatic injury to his right shoulder instead of a repetitive

injury to both upper extremities and the Board should affirm the ALJ's Award. In Docket No. 261,065, the respondent and Builders do not dispute the ALJ's findings regarding the right thumb injury but note the right index finger injury occurred at the Sprint project and accordingly should be St. Paul's liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Docket No. 261,065

The claimant's employment after high school has been as an ironworker. The claimant has been an ironworker for respondent since 1989. On January 19, 2000, the claimant was working at the Sprint complex and a shackle fell down striking the claimant's right index finger. The claimant reported the injury and was provided medical treatment. Claimant was diagnosed with a fracture of the right index finger and was treated with a splint. The medical records indicate claimant was to avoid use of his right hand.

It appears claimant may have modified his work duties for a short period of time in order to limit the use of his right hand. However, claimant did return to work and on March 23, 2000, he suffered another accident. On that date, claimant was working on a scissor lift which shifted and caught claimant's right thumb against a steel beam. The tip of claimant's thumb was cut off. This incident occurred while claimant was working at the Oak Park Mall.[1]

As previously noted, there is no dispute that as a result of the March 23, 2000 accident the claimant suffered a 10 percent scheduled disability to the right thumb. And there is no dispute that Builders is the workers compensation carrier liable for this injury. Accordingly, the Board affirms the ALJ's finding in Docket No. 261,065, that claimant suffered a 10 percent scheduled disability to his right thumb and affirms assessment of the award against respondent and Builders.

In Docket No. 261,065, the ALJ also awarded claimant a 20 percent scheduled disability to the right index finger. In the Award, the ALJ noted that this scheduled injury would be awarded against respondent and both insurance carriers "because of their intimate involvement in this rather progressive sequence of injuries."

It must be noted that the injury to the right index finger was a discrete traumatic accident which resulted in a fracture to that finger. And the injury occurred while claimant

[1] The parties stipulated that Builders was the workers compensation carrier for that project.

was working on the Sprint complex which the parties stipulated was under St. Paul's insurance coverage. Accordingly, the Board finds that respondent and St. Paul would be liable for any medical or permanent disability compensation awarded claimant for that injury.

However, St. Paul argues claimant failed to file an application for hearing with regard to the January 19, 2000 injury to his right index finger. The claimant's E-1 application for hearing filed November 6, 2000, and assigned Docket No. 261,065 alleged a date of accident of March 23, 2000, and alleged injuries to the right thumb and hand. The claimant's application for hearing filed November 6, 2000, and assigned Docket No. 261,066 alleged a date of accident of January 2, 2000, and alleged repetitive injuries to the body as a whole, left and right shoulders, and left and right upper extremities.[2] The applications for a series of repetitive accidents did not reference the separate discrete injury to the right index finger. In summary, the respondent and St. Paul argue the claimant filed an application for hearing for the March 23, 2000 injury to his right thumb and an application for hearing for repetitive trauma injuries occurring from January 1990 through March 23, 2000, but did not file an application for hearing for the January 19, 2000 injury to his right index finger. The Board agrees.

K.S.A. 1998 Supp. 44-534(b) provides:

> No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

The cursory evidence regarding the January 19, 2000 injury to claimant's right index finger establishes that he received treatment consisting of medication and a splint for the finger. Claimant returned to work and did not file an application for hearing regarding that discrete traumatic accident to his right index finger.

The Board finds the ALJ's award for compensation for the scheduled disability to the right index finger must be reversed and an award of compensation for that accidental injury denied because there was neither timely, nor any, application for hearing filed for the January 19, 2000 accident.

Docket No. 261,066

As previously noted, the claimant was employed as an ironworker working exclusively for respondent since 1989. In 1999 claimant began to experience pain in both

[2] The alleged January 2, 2000, date of accident in Docket No. 261,066 was later amended to a series of accidents from January 1990 up to and including March 23, 2000.

of his shoulders, arms and hands that caused him difficulty performing his job duties. Claimant noted that he had difficulty holding tools. Claimant discussed his problems with his supervisor.

As claimant continued working on the Sprint complex project his shoulder pain persisted as well as arm and wrist pain. Claimant noted that he discussed his ongoing problems with his supervisor on an almost daily basis. Claimant finally sought treatment for his shoulder and upper extremity complaints with Dr. Fred Ferris who referred claimant to Dr. Mark S. Humphrey.

On February 2, 2000, Dr. Humphrey examined claimant and noted claimant's primary complaints were pain in both shoulders. On examination claimant had crepitation and limitation in the range of motion of his left shoulder as well as crepitation in range of motion of the right shoulder. X-rays were taken of both shoulders and revealed severe arthritis to the left shoulder and mild to moderate arthritis to the right shoulder. An MRI was ordered which indicated a rotator cuff tear in claimant's right shoulder.

On February 23, 2000, Dr. Humphrey discussed the MRI findings with claimant and recommended arthroscopic evaluation and repair of the rotator cuff. Surgery was scheduled for March 24, 2000. As previously noted, claimant continued working and on March 23, 2000 suffered the injury where the tip of his right thumb was cut off. Treatment was provided for that injury and the following day claimant underwent the arthroscopic procedure to repair the right rotator cuff tear.

The arthroscopic procedure revealed a centimeter and a half tear of the rotator cuff, a partial tear of the biceps, a degenerative tear of the labrum as well as loss of articular cartilage in the shoulder. Dr. Humphrey opined that the rotator cuff tear might have been present for long time because there was fatty tissue around the tear which would imply the tear had been present for a long time.

After the surgery, claimant was referred for physical therapy but his shoulder pain did not improve nor did the limitation in his range of motion. On July 6, 2000, Dr. Humphrey concluded claimant was totally disabled from returning to his iron work duties in any capacity. Dr. Humphrey expressed a belief that claimant had a high pain threshold in order to continue working for as long as he had with the level of arthritis present in his left shoulder. Finally, Dr. Humphrey agreed that claimant's job activities as an ironworker would aggravate the claimant's underlying preexisting arthritis in his shoulders.[3]

The claimant did not return to work and sought additional treatment from a rheumatologist. Claimant applied for and received Social Security disability benefits.

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[3] Humphrey Depo. at 50.

The claimant was examined by Dr. Truett L. Swaim on June 4, 2002. Dr. Swaim diagnosed claimant with severe arthritic condition of multiple joints including both shoulders, right elbow, and both knees. The doctor also noted claimant was post right shoulder arthroscopy, status post right index finger proximal phalanx fracture and status post partial amputation of the right thumb. Dr. Swaim concluded claimant's work activities for respondent aggravated and accelerated the arthritic process in both of claimant's shoulders as well as his right elbow and both knees. Finally, Dr. Swaim opined that claimant was not employable. Dr. Swaim testified:

> Q. Did you reach any opinions or conclusions concerning this gentleman's ability to engage in gainful employment as of the time you saw him?
>
> A. Yes.
>
> Q. And what was your assessment?
>
> A. He is totally disabled from employment of his occupation as an iron worker and it is not expected he would be employed at any occupation for which he's qualified, and at that time I did not feel that considering the severity of his condition that he was a candidate for vocational rehabilitation and that he should be on social security disability.[4]

Dr. Swaim concluded claimant suffered a 53 percent functional impairment to the left upper extremity which he converted to a 32 percent whole person functional impairment. Dr. Swaim further provided claimant a 58 percent functional impairment for the right upper extremity which he converted to a 35 percent functional impairment for the right upper extremity.

Although Dr. Swaim had concluded claimant could not work he nonetheless reviewed a task list prepared by vocational expert Mike Dreiling and just factoring in the claimant's upper extremity problems concluded claimant could not perform 12 of 13 tasks. The only task claimant retained the ability to perform was to read and follow blueprints.

At his attorney's request, the claimant was interviewed by Michael Dreiling, a vocational expert, who prepared a list of claimant's work tasks for the 15-year period before his accident. Mr. Dreiling opined claimant was essentially and realistically unemployable.

The ALJ limited the nature and extent of disability in Docket No. 261,066 to a scheduled disability to the right shoulder. The Board disagrees.

The claimant initially sought treatment for pain in both shoulders. X-rays revealed significant arthritis in both shoulders more severe on the left than right. An MRI revealed

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[4] Swaim Depo. at 28.

a rotator cuff tear on the right which was surgically repaired. Nonetheless, claimant's pain in both shoulders persisted. The fact that treatment focused on the right shoulder rotator cuff tear does not limit claimant's injury to that shoulder. Dr. Humphrey concluded claimant had degenerative arthritis in both shoulders and that his work for respondent aggravated that condition. Dr. Swaim arrived at the same conclusion and provided permanent functional impairment ratings for the bilateral shoulder repetitive injuries.

The Board finds claimant suffered repetitive bilateral shoulder injuries as a result of his work-related activities for respondent. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[5]

When a worker's accident results in injury to a part of his body which is included in the schedule under K.S.A. 44-510d, such injury does not preclude compensation for general bodily disability if the opposite extremity or an unscheduled part of the worker's body is also injured. When the injury is both to a scheduled member and to an unscheduled portion of the body, or to two parallel extremities, compensation should be awarded for a general body disability.[6]

The Board finds the Supreme Court's analysis in *Pruter*, coupled with the language of K.S.A. 44-510c(a)(2), requires an award based upon a general body disability and not two separate scheduled injuries under K.S.A. 44-510d.

K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

In the absence of proof to the contrary, injuries to parallel extremities are presumed to constitute a permanent total disability.

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[5] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[6] *See Pruter v. Larned State Hospital*, 28 Kan. App. 2d 302, 16 P.3d 975 (2000), *aff'd* 271 Kan. 865, 26 P.3d 666 (2001); *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

In this case both Dr. Swaim as well as the vocational expert, Mr. Dreiling have offered opinions that claimant is realistically unemployable. In *Wardlow*[7], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The same circumstances led Mr. Dreiling and Dr. Swaim to conclude the claimant was realistically unemployable. Respondent did not offer any contrary evidence. The Board concludes claimant is realistically and essentially unemployable and has met his burden of proof to establish that he is permanently and totally disabled.

The next determination is the date of accident. Following creation of the bright line rule in the 1994 *Berry*[8] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*[9], which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* also focuses upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[10]

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[7] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[8] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[9] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[10] Id. at Syl. ¶ 3.

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

There appears to be a connecting thread between the decisions beginning with *Berry* that address the date of accident issue in cases involving injuries from repetitive trauma. It is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in *Berry* when it described one such condition, carpal tunnel syndrome, as "neither fish nor fowl.") A claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[11]

In this case, claimant received treatment and surgery for the right rotator cuff was scheduled but claimant continued working for respondent until March 23, 2000. And claimant noted that the work he performed the last week he worked required the same physical activities that he performed at the Sprint complex. The claimant testified:

> Q. (By Mr. Horner) Do you know how long you were on that job before March 23rd?
>
> A. It's been a long time ago, but I would say we were there I think a week working on that job.
>
> Q. Were you doing the same kind of physical activities that you described in these two exhibits for the Court?
>
> A. Yes, we were doing not so much anchoring concrete as we were working on the structural part of it all, which included beams, welding, hoisting, grinding, things of this sort, because the front of this particular building had a lot of angle iron in it and one main beam in it, so we had a lot of welding at that particular time.
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> Q. Was there any part of the work at the Montgomery Ward's store at the Oak Park Mall that did not involve the constant use of your arms and legs?

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[11] *Treaster*, Syl. ¶ 4.

A. No, it's constant. Every bit of ironwork takes everything.[12]

Under *Treaster*, if claimant has an injury, the date of accident will be either the date claimant leaves work due to the injury or when new or additional restrictions are imposed by a physician and implemented by respondent by making further job accommodations. Claimant was continuing to do the same or similar work that he had performed for respondent even though rotator cuff surgery had been scheduled. The medical evidence establishes that each and every day worked claimant aggravated and intensified the arthritic condition in both of his shoulders.

The Board finds the rationale of *Depew*, *Berry* and *Treaster* require a finding that claimant suffered one accident and one injury and that benefits should be awarded under a single accident date which, in this case, is the last date worked on March 23, 2000.

It must be remembered that the bright line rule first announced in *Berry* is intended to establish a single date of accident for the purpose of computing the award. This does not mean that the injury in fact occurred on only one day. By definition, a repetitive trauma injury occurs over a period of time. The fact that we are dealing with a series of accidents cannot be lost sight of when determining a single "date of accident" for legal purposes in applying the Workers Compensation Act. Consequently, the date of accident is March 23, 2000. Accordingly, respondent and Builders are liable for the compensation awarded in Docket No. 261,066.

The Board modifies the ALJ's Award in Docket No. 261,066 to find the date of accident is March 23, 2000, and claimant is permanently and totally disabled.

AWARD IN DOCKET NO. 261,065

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated June 1, 2004, is affirmed in part and reversed in part. The award of compensation to claimant against respondent and Builders for a 10 percent scheduled disability to his right thumb is affirmed. The award of permanent compensation to claimant for the January 19, 2000 injury to his right index finger is reversed because claimant failed to file timely application for hearing and accordingly an award of compensation is denied.

AWARD IN DOCKET NO. 261,066

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated June 1, 2004, is modified to provide claimant an award of permanent and total disability against respondent and Builders.

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[12] R.H. Trans. at 35-36.

The claimant is entitled to 7 weeks temporary total disability compensation at the rate of $383 per week or $2,681 followed by permanent total disability compensation at the rate of $383 per week for a total award not to exceed $125,000 for a permanent total general body disability.

As of December 22, 2004, there would be due and owing to the claimant 7 weeks of temporary total disability compensation at the rate of $383 per week in the sum of $2,681 plus 240.86 weeks of permanent total disability compensation at the rate of $383 per week in the sum of $92,249.38 for a total due and owing of $94,930.38, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $30,069.62 shall be paid at $383 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of December 2004.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and St. Paul Fire & Marine Ins. Co.
C. Anderson Russell, Attorney for Respondent and Builders' Assoc.
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director